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DEPARTMENT OF AGRICULTURE

3410-02P

**Agricultural Marketing Service**

**7 CFR Part 958**

**[Doc. No. AMS-FV-11-0025; FV11-958-1 FR]**

**Onions Grown in Certain Designated Counties in Idaho, and  
Malheur County, Oregon; Modification of Handling  
Regulations**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the handling regulation for onions handled under the Idaho-Eastern Oregon onion marketing order. The marketing order regulates the handling of onions grown in designated counties in Idaho, and Malheur County, Oregon, and is administered locally by the Idaho-Eastern Oregon Onion Committee (Committee). This rule revises the marketing order's handling regulation to allow special purpose shipments of onions for experimentation. The revision will allow the Idaho-Eastern Oregon onion industry to identify and develop new market niches and is expected to benefit producers, handlers, and consumers of onions.

**EFFECTIVE DATE:** [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Barry Broadbent or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 805 SW Broadway, suite 930, Portland, OR 97205; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: Barry.Broadbent@ams.usda.gov or GaryD.Olson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement No. 130 and Marketing Order No. 958, both as amended (7 CFR part 958), regulating the handling of onions grown in certain designated counties in Idaho, and Malheur County, Oregon, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under § 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the handling regulation for onions handled under the order. Specifically, this rule revises the handling regulation to allow special purpose shipments of onions for the purpose of experimentation without regard to the minimum grade, size, maturity, pack,

and inspection requirements of the order. The revision will give the Idaho-Eastern Oregon onion industry the opportunity to identify and develop new markets. The changes are expected to benefit producers, handlers, and consumers of onions. This rule was unanimously recommended by the Committee at a meeting on January 20, 2011.

Sections 958.42, 958.51, 958.52, and 958.60 of the order provide authority for assessment, mandatory inspection, and establishment of grade, size, quality, maturity, and pack regulations applicable to the handling of onions. Section 958.53 of the order provides authority for the issuance of special regulations, or the modification, suspension, or termination of requirements in effect pursuant to §§ 958.42, 958.52, 958.60, or any combination thereof, in order to facilitate the handling of onions for certain specified purposes.

Section 958.328 establishes minimum requirements for onions handled subject to the order. Currently, no person shall handle any lot of onions unless such onions are inspected, are at least "moderately cured", and meet the grade, size, maturity, and pack requirements of paragraphs (a), (b), and (c). Paragraph (e) delineates specific types

of special purpose shipments that are exempt from the requirements of the order. Paragraph (f) outlines the safeguards for such special purpose shipments.

The Committee recommended this revision to the handling regulations to respond to the industry's desire to have greater flexibility in indentifying and pursuing unique marketing opportunities for onions that do not conform to the requirements of the order. The concern from the onion industry is that onion producers and handlers within the order's production area are at a competitive disadvantage, relative to other onion producing regions, with respect to their ability to identify and develop new markets for non-standard onions. Adding authority to allow experimental onion shipments under the order provides handlers access to markets not previously available to them.

An example that demonstrates how the industry benefits from this final rule would be a scenario in which a handler wants to produce and ship a unique, irregularly shaped small onion (e.g. a heart or a square shape) in order to target a newly developed niche market. Since irregular shape is a physical characteristic that does not conform to

the order's grade requirements, previously such onions could not have been handled under the marketing order. However, with this exemption for experimentation the Committee can now allow the shipment of those specific type onions while still maintaining the integrity of the order. If the market for such onions increases significantly, the Committee could then incorporate changes into the handling regulations to accommodate their handling without the continued need for an exemption.

The potential for marketing opportunities like the example described above motivated the Committee to recommend modifying the handling regulation to add "experimentation" to the already established list of special purpose shipments allowed under the order. Onion shipments for experimental purposes will thus be exempt from the grade, size, maturity, pack, and inspection requirements of the handling regulation. Shipments made under the experimental exemption continue to be subject to the assessment requirement of the order, however. With this special purpose shipment provision for experimentation, handlers have greater flexibility in pursuing various types of unique marketing opportunities

that were previously not available under the handling regulation.

The Committee will require handlers to request pre-approval for such experimental exemptions. Through the approval process, the Committee will be able to regulate the quantity and timing of such shipments. It is the goal of the Committee that any experimental shipments of onions will be temporary in nature. At the point that emerging experimental markets reach a sufficient volume or continue for such a length of time as to be deemed sustainable by the Committee, the Committee could then recommend changes to the handling regulation requirements to accommodate the marketing of such onions on a permanent basis.

#### **Final Regulatory Flexibility Analysis**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that

small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 35 handlers of Idaho-Eastern Oregon onions who are subject to regulation under the order and approximately 250 onion producers in the regulated area. Small agricultural service firms, which include onion handlers and receivers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

The National Agricultural Statistics Service (NASS) reported in the "Vegetables 2010 Summary", published in January 2011, that the total F.O.B. value of onions in the regulated production area for 2010 was \$133,041,000. Based on an industry estimate of 35 handlers, the average value of onions handled per handler is \$3,801,000, well below the SBA threshold for defining small agricultural service firms. In addition, based on an industry estimate of 250



producers, the average F.O.B. value of onions produced in the industry is \$532,164 per producer. Since the F.O.B. value is usually significantly higher than the farm gate value that the producers actually receive, most onion producers within the order's production area could be considered small agricultural producers under the SBA definition. Therefore, it can be concluded that the majority of handlers and producers of Idaho-Eastern Oregon onions may be classified as small entities as defined by the SBA.

This final rule revises § 958.328(e) of the order's handling regulation to allow special purpose shipments of onions for the purpose of experimentation without regard to the minimum grade, size, maturity, pack, and inspection requirements currently prescribed under paragraphs (a), (b), and (c) of § 958.328. The revision will allow the Idaho-Eastern Oregon onion industry to identify and develop new markets for non-standard onions that have not been previously available. The changes are expected to benefit producers, handlers, and consumers of onions.

At a meeting on January 20, 2011, the Committee discussed the impact of the recommended changes on handlers

and producers in terms of increased costs. The Committee believes that, since this change exempts certain shipments of onions from regulation, this action will not add any additional requirements or costs relative to the existing regulation. Since the utilization of the special purpose shipment provision is voluntary in nature, any additional regulatory burden placed on a handler as a result of this final rule will be by their choice. The changes may, however, create opportunities for producers and handlers to develop new markets and to enhance revenues. The Committee believes that the potential benefit associated with this action outweighs any potential increase in administrative cost or regulatory burden incurred by the handler.

The Committee discussed various alternatives to adding experimental shipments to the list of special purpose shipment exemptions contained in the order's handling regulation. Some members suggested that the provision was too broad in scope and needed greater restrictions. After deliberation, the Committee concluded that it would be impossible to anticipate what might be "experimental" in the future and that affording the greatest latitude to the provision, while maintaining strict Committee oversight,

was in the best interest of the industry. The Committee also considered taking no action with regard to adding an experimental shipment provision, citing the potential for abuse. After deliberation, the Committee agreed that the experimental shipment provision is needed to respond to changes in the industry and that there would be sufficient safeguards to protect the integrity of the order.

This final rule imposes additional reporting burdens on handlers who make special purpose shipments of experimental onions. This action requires the modification of two existing Committee forms and an increase in burden hours for three existing forms. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0241, "Onions Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon, M.O. No. 958." However, as a

result of this action changes in those requirements are necessary and have been submitted to OMB for review.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

In addition, the Committee's meeting was widely publicized throughout the onion industry, and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the January 20, 2011, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on June 21, 2011 (76 FR 35997). Copies of the rule were made available to all Committee members and onion handlers. Finally, the rule was made available through the Internet by USDA and the Office of

the Federal Register. A 60-day comment period ending August 22, 2011, was provided to allow interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: [www.ams.usda.gov/MarketingOrdersSmallBusinessGuide](http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide). Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping onions from the 2011-2012 crop and handlers want to take advantage of the

revision as soon as possible. Further, handlers are aware of this rule, which was unanimously recommended by the committee at a public meeting. Also, a 60-day comment period was provided for in the proposed rule.

**List of Subjects in 7 CFR Part 958**

Marketing agreements, Onions, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 958 is amended as follows:

**PART 958 - ONIONS GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON**

1. The authority citation for 7 CFR part 958 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. In § 958.328, revise paragraph (e) and the introductory sentence of paragraph (f) to read as follows:

**§ 958.328 Handling regulation.**

\* \* \* \* \*

(e) Special purpose shipments. (1) The minimum grade, size, maturity, pack, assessment, and inspection requirements of this section shall not be applicable to shipments of onions for any of the following purposes:

- (i) Planting,
- (ii) Livestock feed,
- (iii) Charity,
- (iv) Dehydration,
- (v) Canning,
- (vi) Freezing,
- (vii) Extraction,
- (viii) Pickling, and
- (ix) Disposal.

(2) Shipments of onions for the purpose of experimentation, as approved by the Committee, may be made without regard to the minimum grade, size, maturity, pack, and inspection requirements of this section. Assessment requirements shall be applicable to such shipments.

(3) The minimum grade, size, and maturity requirements set forth in paragraph (a) of this section shall not be applicable to shipments of pearl onions, but the maximum size requirement in paragraph (h) of this section and the assessment and inspection requirements shall be applicable to shipments of pearl onions.

(f) Safeguards. Each handler making shipments of onions outside the production area for dehydration,

canning, freezing, extraction, pickling, or experimentation  
pursuant to paragraph (e) of this section shall:

\* \* \* \* \*

Dated: October 26, 2011

Ellen King  
Acting Administrator  
Agricultural Marketing Service

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